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[Tru/Fals]isms: A Statistical Analysis of Several Arkansas Judicial Election Bromides

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[TRU/FALS]ISMS: A STATISTICAL ANALYSIS OF SEVERAL ARKANSAS JUDICIAL ELECTION BROMIDES

*Honorable Timothy Davis Fox**

Abstract

Which one of the following statements, if any, is most probably true and correct in contested Arkansas trial court elections?

- a) The cost of judicial elections is “skyrocketing”;
- b) Attorneys provide most of the contributions for judicial campaigns;
- c) The incumbent enjoys a 5% to 10% edge;
- d) Attorneys can’t get judges elected but they can get them defeated;
- e) The candidate raising the most money wins judicial elections; or
- f) Hot glass looks like cold glass.

If you already know the answer, you had better run along because you are probably late for your Mensa meeting. If you are mildly curious but tight on time, skip to the conclusion. But if you have a few minutes, I think you will find both the substance and form of the information in this article interesting and easily digestible.

I. INTRODUCTION

We have all heard and repeated at least some of “them.” All of us. Well, maybe not those of our brethren who attempt to hide their chronological infirmity by referring to themselves as the “Young Lawyers Section.” You know who “they” are. They are the ones who think it is helpful to tell the venire panel that it is their first jury trial. A statement inevitably followed by a moment of uncomfortable lachrymosity. But enough of “they,” this article focuses on “them.” “Them” is the individual precepts of conventional wisdom concerning the election of judges in Arkansas. The principal focus of this article is to ascertain whether statistical information compiled from Arkansas judicial candidates’ financial information supports such anecdotal statements.

* After practicing law for over twenty years, the author was elected, in 2002, as Circuit Judge, Sixth Division, Sixth Judicial Circuit of the State of Arkansas. Judge Fox is the first Arkansas jurist to earn a Master of Judicial Studies degree.

The tested statements have been placed into the most concise method of discovering the truth known to the modern world: a multistate bar examination multiple choice question. The question is:

Which of the following statements, if any, is most probably true and correct in contested Arkansas trial court elections?

- a) The cost of judicial elections is “skyrocketing”;
 - b) Attorneys provide the majority of contributions to judicial campaigns;
 - c) The incumbent enjoys a 5% to 10% edge;
 - d) Attorneys can’t get judges elected but they can get them defeated;
 - e) The candidate raising the most money always wins judicial elections;
- or
- f) Hot glass looks like cold glass.

The only comprehensive analyses to date concerning Arkansas judicial election financial information were written in 1989 and 1992.¹ Since such articles were published, the voters of Arkansas approved Amendment 80 to the Arkansas Constitution,² effecting material changes to the Arkansas judicial branch of government. Arkansas has now completed three full judicial election cycles since the passage of Amendment 80 and is in the early stages of the fourth post-Amendment 80 election process. Although there have been a number of articles written concerning Amendment 80’s merger of law and equity,³ there has been no written assessment of the effects that Amendment 80 may have occasioned upon the financial mechanics of judicial elections in the State of Arkansas.

This article has three purposes. First, it seeks to statistically quantify and interpret amounts and sources of campaign contributions in contested Arkansas trial court contests for the 1996 through 2006 elections. Second, it addresses whether the compiled data supports or refutes the possible answers to the multiple-choice question concerning judicial election “conventional wisdom.” And finally, it seeks to ascertain whether the compiled statistics evidence any change in Arkansas judicial financing that may be attributable to the implementation of Amendment 80.

1. James D. Gingerich, *Campaign Finance in Judicial Elections*, 23 ARK. LAW. 66 (Apr. 1989) [hereinafter “Gingerich 1989”]; James D. Gingerich & Warren Readnour, *The 1990 Arkansas Judicial Elections: Much Ado About Nothing?*, 23 ARK. LAW. 37 (July 1992) [hereinafter “Gingerich & Readnour 1992”].

2. Amendment 80 to the Arkansas Constitution appeared on the 2000 general election ballot as “Referred Amendment 3.” Publisher’s Notes, ARK. CONST. amend. 80.

3. See, e.g., John J. Watkins, *The Right to Trial by Jury in Arkansas After the Merger of Law and Equity*, 24 U. ARK. LITTLE ROCK L. REV. 649 (2002); Larry Brady & J.D. Gingerich, *A Practitioner’s Guide to Arkansas’s New Judicial Article*, 24 U. ARK. LITTLE ROCK L. REV. 715 (2002).

II. RELEVANT SECTIONS OF AMENDMENT 80 AND IMPLEMENTING LEGISLATION

The study period included in this article contains judicial election cycles from 1996 through 2006. Three of the elections, 1996, 1998, and 2000, were pre-Amendment 80, and the remaining three elections were post-Amendment 80. Prior to the passage of Amendment 80, judges in Arkansas were elected on a partisan basis in the same manner and same election framework as elected officers from the other two branches of government.⁴ There were three types of trial judges: chancery judges, circuit judges, and circuit/chancery judges.⁵ Chancery judges had six-year terms,⁶ circuit judges' terms were four years,⁷ and circuit/chancery judges were elected to four-year terms.⁸ Amendment 80 removed the differences in title and subject matter jurisdiction.⁹ All of the former categories of state court trial judges are now circuit judges exercising general jurisdiction, and all have six-year terms.¹⁰ The effect, if any, that the lengthening of the circuit judges' terms of office may have had on judicial campaign finances is outside the scope of this article.

Section 17(A) of Amendment 80 to the Arkansas Constitution provides that "Circuit Judges and District Judges shall be elected on a nonpartisan basis by a majority of qualified electors voting for such office within the circuit or district which they serve." To implement section 17(A), the Arkansas General Assembly enacted Act 1789 of 2001, codified as Arkansas Code section 7-10-102.¹¹ Section 7-10-102(b)(1) sets the general elections for nonpartisan judicial elections on "the same dates and at the same times and places as provided by law for preferential primary elections." In the event that a nonpartisan judicial candidate fails to receive a majority of the votes, the nonpartisan judicial runoff election is held "on the same date and at the same times and places as the November general election."¹²

Although there were a number of legitimate reasons for establishing the nonpartisan judicial election schedule, not the least of which was minimizing cost to taxpayers, the nonpartisan election sequencing presents several

4. ARK. CODE ANN. § 7-10-102 (LEXIS Repl. 1999).

5. ARK. CONST. of 1874, art. VII, § 11; ARK. CONST. of 1874, art. VII, § 15, 1977 Ark. Acts 432.

6. ARK. CODE ANN. § 16-13-309 (LEXIS Repl. 1999).

7. ARK. CONST. of 1874, art. VII, § 17.

8. 1977 Ark. Acts 432.

9. ARK. CONST. amend. 80.

10. ARK. CONST. amend. 80, § 16(B).

11. ARK. CODE ANN. § 7-10-102 (LEXIS Repl. 2007).

12. ARK. CODE ANN. § 7-10-102(c)(2) (LEXIS Repl. 2007).

interesting election dynamics.¹³ With respect to its potential impact on campaign contributions, the most important difference is the inversion of the relationship between general elections and runoffs. General elections customarily draw a much larger voter turnout than runoff elections. This is no longer the case in Arkansas judicial elections. The nonpartisan judicial general election turnouts on the May party primary date are significantly lower than the nonpartisan judicial runoff turnout on the November general election date.¹⁴ Additionally, runoffs typically occur within several weeks of the general election. Judicial runoff elections in Arkansas are now conducted approximately six months following the nonpartisan general election.¹⁵

III. RESEARCH METHODOLOGY

Candidates for elective office, including judicial office, are subject to the requirements of the Arkansas Campaign Practices Act.¹⁶ The campaign finance reporting requirements applicable to judicial candidates are set forth in Arkansas Code section 7-6-207. The minimum monetary threshold for contributions and expenditures that invokes the reporting requirements of Arkansas Code section 7-6-207 is \$500.¹⁷ If a candidate collects or spends less than that amount, there is no reporting requirement other than a final report.¹⁸ The reporting requirements once the \$500 minimum is satisfied are as follows:

(a) a quarterly report for each quarter in a calendar year in which the candidate is not listed on a ballot;¹⁹

(b) beginning with the month of January in the calendar year in which the candidate's name will be on the ballot, a monthly report is required;²⁰

13. First, based upon numerous comments made to me as well as information obtained anecdotally from other judges, many voters still expect that their vote (or in any event their "final" vote) for a judicial position will be during the November election. Second, the election at which voters are now asked to select nonpartisan judicial officers or judicial runoff candidates is the election day that was formerly the province exclusively of the political parties.

14. Prior to Amendment 80, voter turnout for the general election was approximately four times that of judicial runoff elections. After Amendment 80 the runoff turnout has been about two and a half to three times that of the general election. The average voter participation figures for the 1996 through 2006 judicial races are as follows:

	1996	1998	2000	2002	2004	2006
General Election	22,606	17,516	21,992	9082	4480	6806
Runoff	4088	n/a	3898	24,584	17,181	31,467

15. ARK. CODE ANN. § 7-10-102(c)(2) (2007).

16. ARK. CODE ANN. § 7-6-101, *et seq.* (LEXIS Repl. 2007).

17. *Id.* § 7-6-207(c)(1) (LEXIS Repl. 2007).

18. *Id.*

19. *Id.* § 7-6-207(a)(1)(A).

(c) in any month in which part of the month is included in a required pre-election report or a final report, no monthly report is due for that month;²¹

(d) pre-election reports are required for the period between the last filed report and ten days before the election;²² and

(e) a final election report for each election, general or runoff.²³

The statistics in this article concerning candidate contributions were obtained from the finance reports filed with the Arkansas Secretary of State. The data concerning winning, losing, election contest margins, and numbers of votes were gathered from the election results as certified to the Arkansas Secretary of State. All of the source documents used in conducting this study are available on-line in very user-friendly formats.²⁴ Sorting the information, however, from the financial reports was more difficult than originally expected. Whether because of an abundance of caution or ignorance of the statutory requirements, duplicate reports and reports containing duplicative information are not uncommon in the judicial filings. As an example, there was one instance in which the exact same report was filed four times on four different days.²⁵ Additionally, the forms provided by the Secretary of State's office changed several times during the 1996 through 2006 period. In one version of the forms, the reporting area for cumulative information was at the bottom of the first page of the report, and in another version the cumulative total was to the right of the reporting period contribution and expenditure boxes. Some candidates kept running totals, some failed to maintain running totals for the first few months, and some never kept running totals. In races involving more than one election, some candidates terminated their cumulative totals after the initial election and began anew for the second election, whereas others elected to subtotal after the first election but maintained a single running total for the entire election cycle.

After devoting many hours to various arcane forms of numerical sleuthery, the approach that most consistently eliminated duplication was to identify the initial report for each candidate, mark the ending campaign balance as listed on the initial report, and then review the starting and ending campaign balance numbers listed on every subsequent report for that candi-

20. *Id.* § 7-6-207(a)(1)(B).

21. *Id.* § 7-6-207(a)(1)(B).

22. ARK. CODE ANN. § 7-6-207(a)(1)(C) (2007).

23. *Id.* § 7-6-207(a)(1)(D) (2007).

24. The candidate campaign report filings and candidate financial information filings may be accessed on-line at www.sos.arkansas.gov/elections/ce/index.php. Election results are available at www.sos.arkansas.gov/elections_election_results.html.

25. It is not the purpose of this article to embarrass anyone attempting to comply with the reporting requirements. The information given concerning multiple filings and candidate accounting methodologies is provided merely to advise that exact numbers concerning judicial candidates are often difficult to calculate.

date, regardless of the report file date, to synchronize the numbers. Using this method, the reports, regardless of when filed, could be daisy-chained into a seamless whole. Over a thousand financial report filings were reviewed using this methodology.

Arkansas Code section 7-6-207(b)(1)(B) requires for every contribution over \$50 a listing of the name, address, place of business, employer, and occupation of the contributor. Some candidates scrupulously adhere to the requirements of this section, while others take a more Barbossa-esque view.²⁶ The information required by Arkansas Code section 7-6-207(b)(1)(B) is important to this study in two principal areas: candidate campaign contributions and attorney campaign contributions. The submission of section 207 (b)(1)(B) information in the candidate reports is less consistent than the information concerning total campaign contributions.

In an effort to insure the reliability of the candidate campaign contribution information, all of the reports and all sections of the reports for each candidate were cross-checked. Some candidates include candidate loans in contribution totals, while others do not. Some candidates treat any moneys given to their campaigns as loans, some do not call them loans but list them instead as contributions, and other candidates report their financial participation as a mixture of both loans and contributions. Some candidates do not reference any loans, but only show a substantial negative balance on their final campaign report. In some reporting situations, reduction of candidate advances to their campaigns occurs during the interim filings, and in other cases the only reductions for candidate loans are evidenced on the final report. Loans are sometimes listed as being from the spouse of the candidate. For this study, if a report clearly identifies the person loaning money as the candidate or the spouse of the candidate, then such monies are treated as candidate contributions. It is not uncommon for a final report to contain a discrepancy between total contributions and total expenditures. If a candidate's final report contains an unexplained material discrepancy between contributions and expenditures, then the negative discrepancy is allocated for this study as a candidate contribution. The same rationale is used in the event that a final report has a material campaign surplus, in that any outstanding candidate loan is deemed reduced by the amount of the surplus. Finally, in those instances in which a final report shows an unexplained substantial negative balance for the campaign, the amount of the negative balance is treated as a candidate contribution.

Compliance with the requirement of listing contributors' occupations occurs in fewer reports than provision of candidate loan information. No extrapolation has been made for this study based upon the author's personal

26. "[T]he Code is more what you'd call 'guidelines' than actual rules." Captain Hector Barbossa, *PIRATES OF THE CARIBBEAN: CURSE OF THE BLACK PEARL* (Disney 2003).

knowledge of whether a contributor was an attorney. If a candidate's report series consistently identifies contributor occupations, then such candidate's information is included in this study with respect to the attorney contribution statistics. If the contributor information is nonexistent or only partially available, then the attorney contribution category for that candidate is listed as "incomplete" for this study.

Using the parameters enumerated above, statistical information was developed from the financial reports and election information concerning 140 candidates in contested trial judge elections; sixty-five of the candidates are pre-Amendment 80, and the remaining seventy-five are post-Amendment 80 candidates.²⁷ With the exception of one candidate,²⁸ some viable contribution information is available for all of the candidates. The reported information is sufficiently complete concerning attorney contributions for 132 of the 140 candidates in the study.

The 140 trial court candidates engaged in sixty separate races; twenty-eight are pre-Amendment 80 contests, and the remaining thirty-two are post-Amendment 80. Of the sixty races, forty-eight are classified for this article as "one-election" or "non-runoff" races. "One-election" or "non-runoff" races, regardless of whether pre or post-Amendment 80, are races in which there are only two candidates and only one judicial election was necessary to determine the winner. The remaining twelve races, again regardless of whether pre or post-Amendment 80, involved three or more candidates, and at least two elections were required to determine the winner. Incumbents were challenged in nineteen of the sixty contested races. Table I lists the circuit, election year, and Amendment 80 relationship of the contested races included in this study.

TABLE I
Contested Races By Circuit and Election

Cir.	1996	1998	2000	2002	2004	2006	Total	Before/After 80
1	1	1	1	1	1	0	5	3/2
2	0	0	1	3	0	1	5	1/4
3	0	0	0	1	0	0	1	0/1
4	1	2	2	0	0	0	5	5/0
5	0	0	1	0	1	0	2	1/1
6	2	2	1	4	0	0	9	5/4
7N	0	1	0	0	0	0	1	1/0
7S	0	0	0	0	0	0	0	0/0
8N	0	0	0	0	0	1	1	0/1
8S	0	0	0	1	0	0	1	0/1
9E	0	0	0	0	0	0	0	0/0

27. An Appendix listing the election year, name, circuit, and division for each of the 140 candidates can be found at the conclusion of this article.

28. Sam Whitfield, Jr., candidate for the First Circuit in 1996.

9W	1	0	0	0	0	0	1	1/0
10	0	1	0	1	1	0	3	1/2
11	0	0	0	1	0	0	1	0/1
11	0	0	0	1	0	2	3	0/3
12	1	2	0	0	0	0	3	3/0
13	1	0	0	0	0	0	1	1/0
14	0	0	0	2	0	0	2	0/2
15	0	0	0	1	0	0	1	0/1
16	0	0	0	2	0	0	2	0/2
17	0	0	0	1	0	0	1	0/1
17	0	0	0	0	0	0	0	0/0
17	1	0	0	0	0	0	1	1/0
18	0	0	0	0	0	1	1	0/1
18	0	0	0	0	0	0	0	0/0
19	0	1	0	0	0	0	1	1/0
19	1	0	0	1	0	0	2	1/1
20	2	0	0	3	0	0	5	2/3
21	0	1	0	1	0	0	2	1/1
22	0	0	0	0	0	0	0	0/0
23	0	0	0	0	0	0	0	0/0
To-	12	12	6	24	3	5	60	28/32

The information obtained from the data sources was assessed from a number of perspectives. Averages were obtained for the categories of total campaign contributions, candidate campaign contributions, and attorney campaign contributions. The mean was determined for all candidates and then separately for candidates in one-election or non-runoff races and for candidates in multi-election contests. The total, candidate, and attorney campaign contribution categories were then divided into pre- and post-Amendment 80 subcategories and the same averaging computations were performed. The results of these calculations were then charted to determine if any trends could be determined for the entire ten-year study period, for one-election races compared to two election races, and for any post-Amendment election contribution trends suggestive of differences attributable to Amendment 80. Finally, winning and losing percentages were computed for each of the three contribution categories as well as the pre- and post-Amendment chronological subcategories.

IV. ANALYSIS OF DATA

The information concerning each of the three contribution categories—total contributions, candidate contributions, and attorney contributions—is addressed separately, and then a comparison of the three categories is made. For each of the three contribution categories, the dollar amounts for the ten-year study period are reviewed. This review is then followed by a percen-

tage analysis concerning winning or losing, again to see if there are any observable trends.

Prior to beginning any type of statistical comparison, comment must be made concerning a 2006 Second Circuit race. The total contributions and candidate contributions in the 2006 Second Circuit, Division 7 race are so far in excess of any other trial court contest that the race single-handedly skews the results of any attempt to ascertain patterns or trends concerning judicial campaigns. The magnitude of its deviation from the norm is amplified in that it is the only 2006 runoff contest.

The candidates in the subject Second Circuit race were Barbara Halsey, Ray Spruell, and Alan Seagrave. Halsey and Spruell made it to the runoff, with Halsey ultimately elected. The total campaign contributions, candidate contributions, and contributions from attorneys are listed in Table II.

TABLE II
2006 Second Circuit Race
Total, Candidate, and Attorney Contributions

	Total	Candidate	Attorneys
Halsey	\$401,744	\$310,438	\$10,850
Spruell	\$168,858	\$132,454	\$3,250
Seagrave	<u>\$52,453</u>	<u>\$42,436</u>	<u>\$1,200</u>
Total	\$623,145	\$485,328	\$15,300
Average	\$207,715	\$161,776	\$5,100

Although there have been several Arkansas Supreme Court races involving comparable sums of money,²⁹ the 2006 Second Circuit race is clearly anomalous in Arkansas trial court contests. As an illustration, the average total contribution in the Second Circuit race is over 300% higher than the 2006 one-election total contribution average,³⁰ and the Second Circuit candidate average is more than 1600% greater than the one-election candidate contribution average.³¹ It is very interesting, however, that the Second Circuit attorney contribution average of \$5100 is almost exactly the same as the 2006 one-election attorney contribution average.³²

29. The 1990 race between Robert Brown and Judith Rogers had aggregate contributions of approximately \$700,000, and the 2004 race between Jim Gunter, Collins Kilgore, and Paul Danielson had contributions totaling about \$720,000.

30. The 2006 one-election total contribution average was \$50,229.45; the 2006 runoff average was \$207,715.

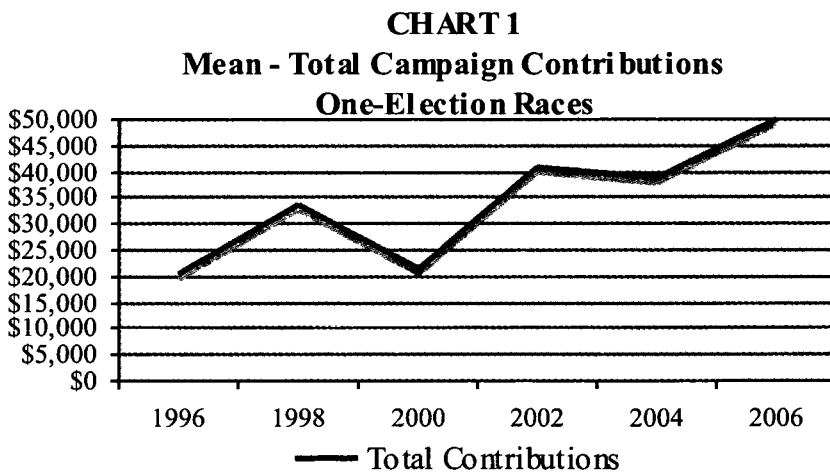
31. The 2006 one-election candidate contribution average was \$9,394.31; the 2006 runoff average was \$161,776.

32. The 2006 one-election attorney contribution average was \$5,119.29; the 2006 runoff average was \$5100.

A. Total Contributions

1. *Averaging Results*

Distribution of the sixty contested trial judge races varies widely between the 1996 through 2006 election period,³³ with 2002 presenting the most contests.³⁴ When the ten year study period is reviewed as a whole, it is clear from the data that total contributions in the one-election race subset are steadily increasing.³⁵ For the purpose of comparison with candidate contributions and attorney contributions, the averaged one-election total campaign contributions are expressed in Chart 1.



As previously stated, only twelve of the sixty elections in the survey are multi-election contests. Post-Amendment 80, these contests involve a general election followed by a runoff election. Pre-Amendment 80, these elections normally included a party primary followed by a general election. Almost 50% of the multi-election contests occurred in 2002.³⁶ Because of the limited number of the multi-election races, no separate trending conclusions were developed for those races. The information from those races,

33. 1996: nine one-election races, three runoff races; 1998: eleven one-election races, zero runoff races; 2000: four one-election races, two runoff races; 2002: nineteen one-election races, five runoff races; 2004: one one-election race, one runoff race; and 2006: four one-election races, one runoff race.

34. *Id.*

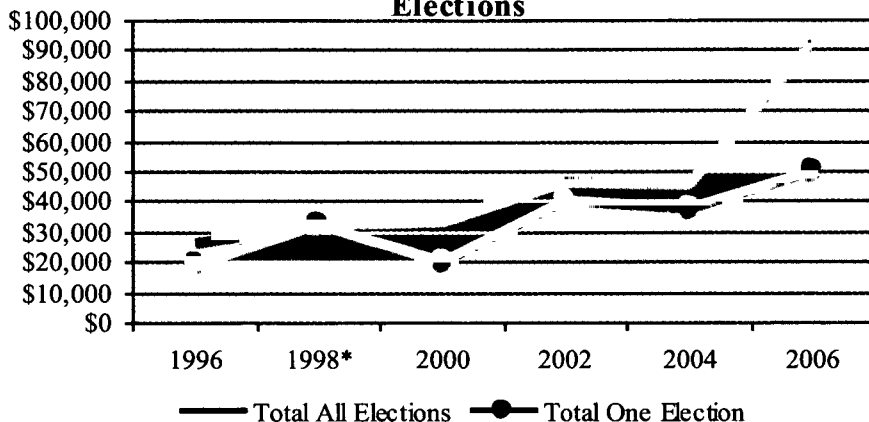
35. The average for one-election races is as follows: 1996: \$20,369.46; 1998: \$33,424.90; 2000: \$21,338.80; 2002: \$41,061.08; 2004: \$38,827.11; and 2006: \$50,229.45.

36. Five of the twelve runoff races were 2002 contests. The remaining seven were as follows: 1996: three; 1998: zero; 2000: two; 2004: one; and 2006: one.

however, helped to create comparisons between the subset of one-election races and the universe of sixty contests.

It is clear that more than one election causes significant additional expense in judicial contests.³⁷ The effect that runoff races have on the total contribution averages is dramatic, as evidenced by Chart 2.³⁸

CHART 2
Mean - Total Campaign Contributions
One-Election Race Subset Compared To All
Elections



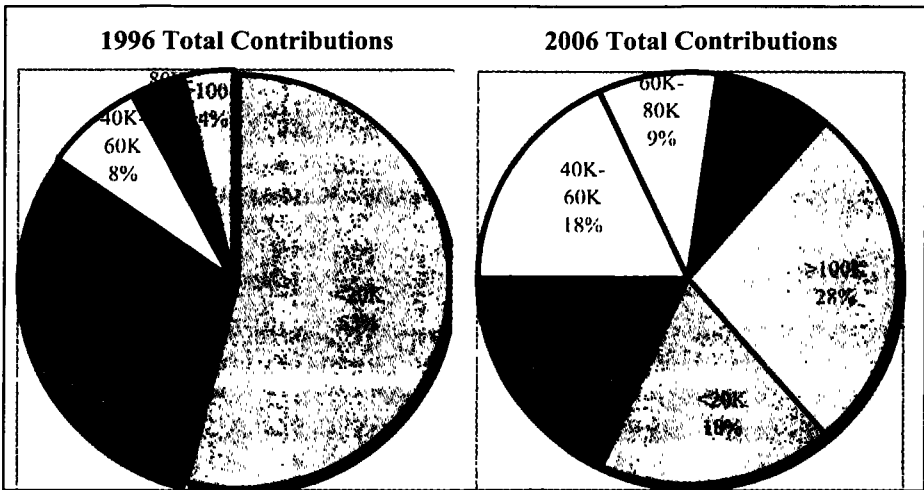
The averaging results evidence a general upward trend in total contributions for trial court candidates. The \$20,000 one-election average in 1996 rose to a 2006 one-election average of \$50,000, a 150% increase over the ten year study period. To cross-check the averaging results, the total contributions also were reviewed on an individual candidate basis by rankings using increments of \$5000. The ranks begin at \$5000 or less and continue in \$5000 increments until the final rank, total contributions of more than \$100,000. All of the candidate information, for both one-election and multi-election contests, is included in the ranked profile. As with the averaging

37. In 1996, the all election average was \$26,776.15, compared with the \$20,369.46 one-election average. In 1998, there were no runoff elections, so the average is the same. In 2000, the all election average was \$34,590.88, compared with the \$21,338.80 one-election average. In 2002, the all election average was \$47,002.20, compared with the \$41,061.08 one-election average. In 2004, the all election average was \$46,691.79, compared with the \$38,827.11 one-election average. Finally, in 2006, the all election average was \$93,155.27, compared with the \$50,229.45 one-election average.

38. 1998 is asterisked because all of the 1998 elections are one-election contests.

methodology, this type of computation also clearly indicates an upward trend. In 1996, 84% of the candidates reported total contributions of \$40,000 or less, with only 8% of the candidates having total contributions in excess of \$60,000. By the 2006 election, however, the less than \$40,000 total contribution percentage plummeted to 36% and candidates reporting more than \$60,000 in total contributions rose to 46% of the total candidate population. The magnitude of the shift in ranks is shown in Chart 3.

CHART 3
Difference Between 1996 & 2006 Total Contributions



Overall, the report filings reflect a substantial but relatively steady increase in total contributions in one-election races for trial court judicial candidates. There is also some evidence to support a conclusion that total contributions in runoff elections may be increasing at a much greater rate than in one-election contests. The next inquiry is to determine if the total contribution data discloses any pattern concerning which candidates win and which candidates lose.

2. Winning/Losing Percentages

The ranking system assists in determining if there is a winning or losing pattern relative to total campaign contributions. For each of the sixty study races, an initial determination was made concerning which candidate received the most in total contributions and whether the "most money" candidate won or lost the contest. The difference in total contributions between the "most money" candidate and his/her opponent then was calculated.

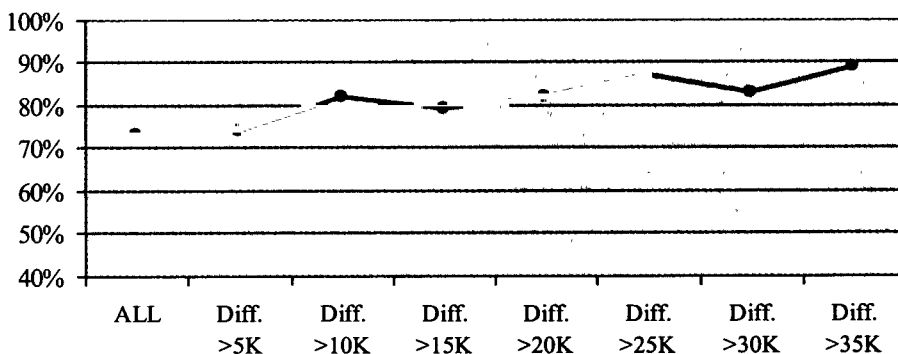
These results were ranked, again utilizing \$5000 increments, with the top rank being a contribution differential in excess of \$35,000. Table III contains the results of these computations.

TABLE III
Win/Loss Results
Total Contribution Differentials
One-Election Races

	0- 5K	5K- 10K	10K- 5K	15K- 20K	20K- 25K	25K- 30K	30K- 35K	>35K
Win	5	2	5	4	5	3	2	8
Lose	4	4	0	2	2	0	1	1
Total	9	6	5	6	7	3	3	9

Overall, the “most money” candidate wins approximately 73% of the time. The “most money” winning percentage increases to 90% when the total contribution differential exceeds \$35,000. The percentage results are visually represented in Chart 4.

CHART 4
Winning Percentage Relative To Total Contribution
Differential One-Election Races

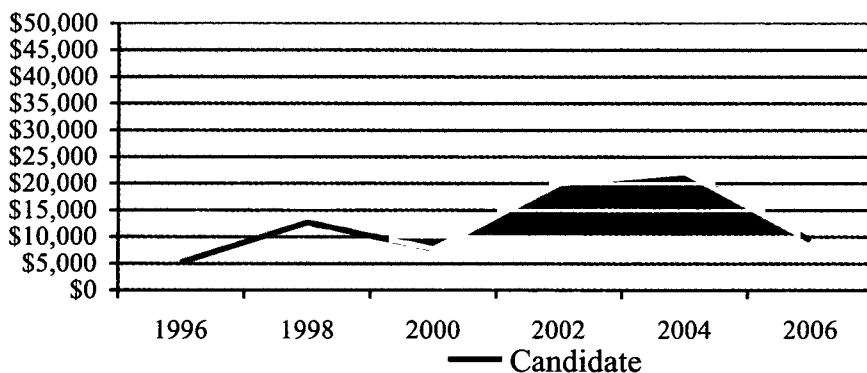


B. Candidate Contributions

1. *Averaging Results*

All but twenty of the 140 judicial candidates included in the study reported some amount of candidate campaign contributions.³⁹ With the exception of the 2006 election cycle, the average amount of candidate contributions in the one-election contests increased during the ten-year study period.⁴⁰ The one-election candidate contribution averages are graphed in Chart 5.

CHART 5
Mean, Candidate Contributions
One Election Races

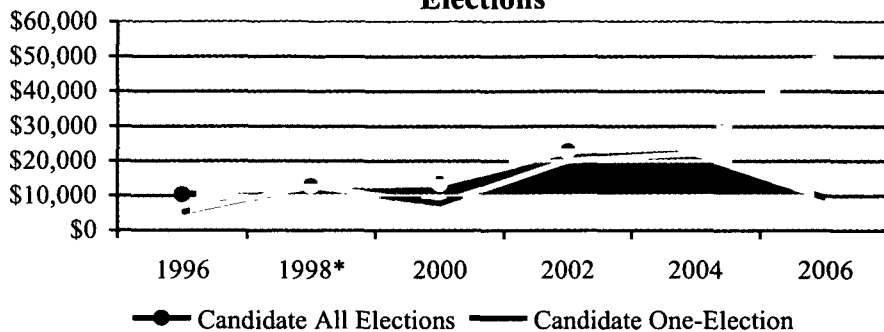


Whether the 2006 one-election candidate contribution downturn is an aberration or the beginning of a new pattern will be determined by future elections. The lower 2006 candidate average appears to be an isolated event when the one-election candidate contribution averages are compared to the candidate contribution averages for all of the elections. It is apparent from the numbers in Chart 6 that the total candidate contribution amounts appear to be continuing in an upward mode.

39. The following candidates reported no candidate contributions: in 1996: Yeargan (Circuit 9W), Anthony (Circuit 13), Smith (Circuit 6), Kilgore (Circuit 6); in 1998: Baker (Circuit 21), Fitzhugh (Circuit 12), Bogard (Circuit 6); in 2000: Lindsay (Circuit 4), Thorne (Circuit 2), Halbert (Circuit 1); in 2002: Jenkins (Circuit 11E), Henry (Circuit 11E), Johnson (Circuit 8S), Hart (Circuit 8S), Moore (Circuit 6), Cazort (Circuit 6), Fox (Circuit 6), Smith (Circuit 3); and in 2006: Wright (Circuit 1). Additionally, the reporting information in 1996 was incomplete for Whitfield, Circuit 1, Division 1.

40. 1996: \$5,740.98; 1998: \$12,698.15; 2000: \$12,134.65; 2002: \$18,342.00; 2004: \$23,919.49; and 2006: \$9,394.31.

CHART 6
Mean - Candidate Contributions
One-Election Race Subset Compared To All
Elections



2. *Winning/Losing Percentages*

There were two one-election races in which neither candidate used any personal funds.⁴¹ The win/loss results of the “most money” candidate are summarized in Table IV.

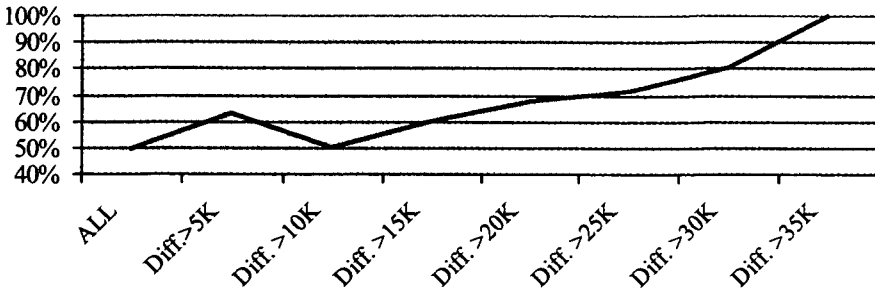
TABLE IV
Win/Loss Results
Candidate Contribution Differentials
One-Election Races

	0 – 5K	5K – 10K	10K- 15K	15K- 20K	20K- 25K	25K- 30K	30K- 35K	>35K
Win	5	7	1	3	1	1	2	2
Lose	12	1	4	3	1	1	1	0
Total	17	8	5	6	2	2	3	2

The winning percentages for the candidate contribution differential results for the “most money” are graphically represented in Chart 7. The overall win percentage for the “most money” candidates is a skosh shy of 50%.

41. 2002: Johnson-Hart, Circuit 8S, Division 3; 2002: Henry-Jenkins, Circuit 11E, Division 1.

CHART 7
Winning Percentage Relative To
Candidate Contribution Differential



C. Attorney Contributions

1. *Averaging Results*

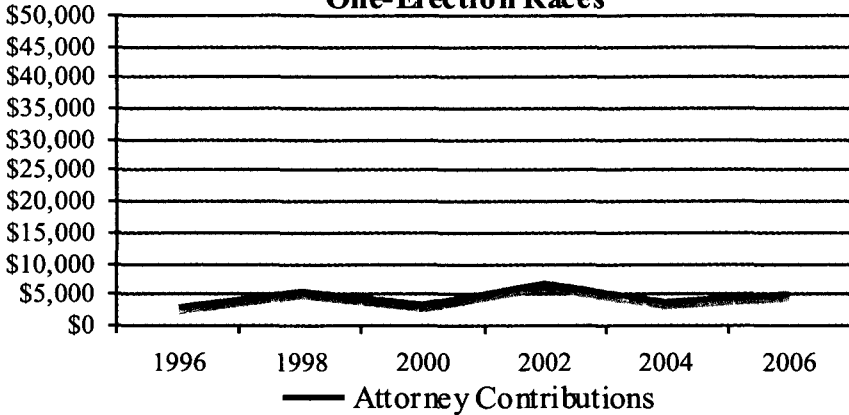
The average attorney contribution for one-election races ranges from approximately \$3000⁴² to almost \$7000.⁴³ Attorney contributions is the only category in the study that shows no clear pattern of growth. As a percentage of the average total contribution, the attorney contribution component of one-election cases has been decreasing.⁴⁴ The average attorney contributions for each election cycle expressed in dollar amounts are graphed in Chart 8.

42. 1996.

43. 2002.

44. 1996: 15%; 1998: 17%; 2000: 15%; 2002: 17%; 2004: 10%; and 2006: 10%.

CHART 8
Mean, Attorney Campaign Contributions
One-Election Races



2. *Winning/Losing Percentages*

Approximately 50% of the one-election contests have attorney contribution differentials of less than \$5000.⁴⁵ The differential ranking spread for attorney contributions is different than that of total or candidate contributions.⁴⁶ All of the attorney contribution differential rankings are stated in Table V.

TABLE V
Win/Loss Results
Attorney Contribution Differentials
One-Election Races

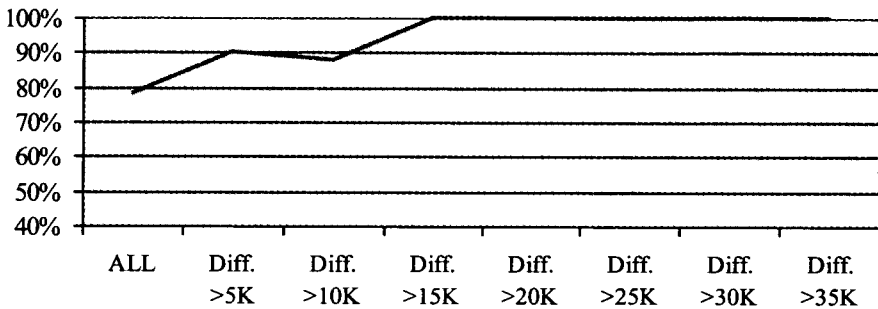
	0 – 5K	5K – 10K	10K- 15K	15K- 20K	20K- 25K	25K- 30K	30K- 35K	>35K
Win	16	12	1	2	1	0	1	2
Lose	8	1	1	0	0	0	0	0
Total	24	13	2	2	1	0	1	2

45. This statistic is based on seventeen of the forty-five one-election contests for which comparative information was available.

46. The number of races having an attorney contribution differential of \$5000 or less is substantially higher than that found in total contributions or candidate contributions. The total contribution differential increment of \$5000 or less occurs in only about 19% of the races. The candidate contribution differential increment of \$5000 or less occurs in about 38% of races.

As a whole, the “most money” attorney contribution group has a winning percentage of 67%. The winning percentage jumps to 90% if the “most money” candidate’s attorney contribution is more than \$5,000 that of his or her opponent. The results of all of the \$5,000 incremental rankings are represented by Chart 9.

CHART 9
Winning Percentage Relative To
Attorney Contribution Differential



D. Total Candidate & Attorney Contributions

1. *Averaging Results*

Placing the chart information concerning total, candidate, and attorney contributions together in a single graph creates a very interesting visual. If the averages are divided into one-election and multi-election contests, several patterns further emerge. Chart 10 shows the one-election averages, and Chart 11 shows a comparison between the one-election averages and the multi-election averages.

CHART 10
Mean - Total, Candidate and Attorney Contributions
One-Election Races

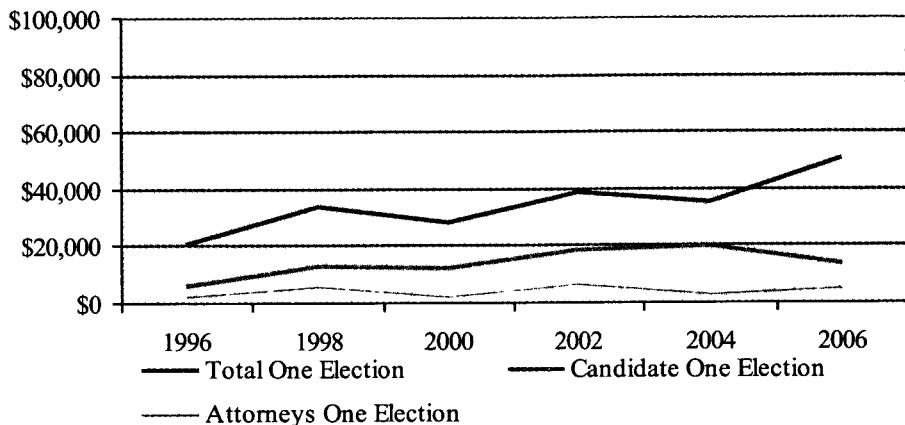


CHART 11
Mean - Total, Candidate and Attorney
Contributions
One-Election Race Subset Compared To All
Elections

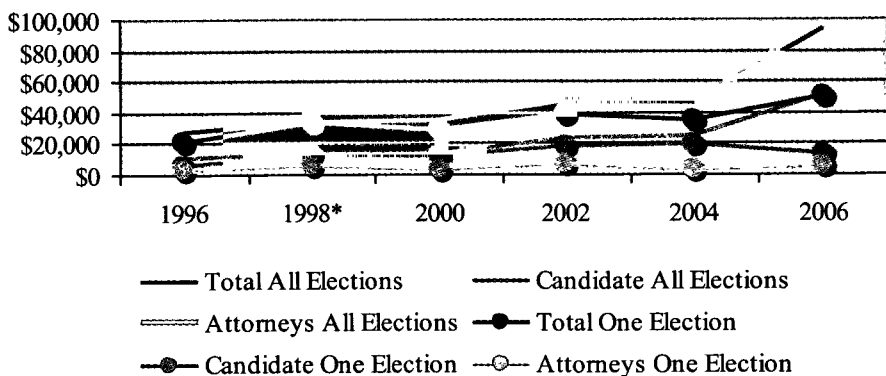


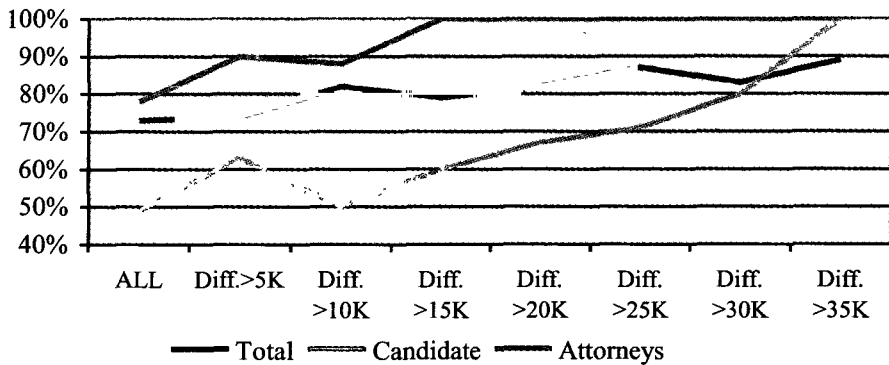
Chart 10 plainly shows that judicial candidates foot a much larger portion of total contributions than do attorneys. Chart 11 reveals three patterns:

(i) the cost of multi-election races is growing at a higher rate than one-election races; (ii) judicial candidates self-finance a much larger portion of multi-election races when compared to one-election races and provide an even higher proportion of total contributions in multi-election races than in one-election races; and (iii) attorneys' financial participation does not change regardless of whether the contest is one-election or multi-election.

2. *Winning/Losing Percentages*

Perhaps the most striking comparison of the contribution data is found by comparing the winning percentage of the "most money" candidates in the total, candidate, and attorney contribution categories using the incremental contribution differential. These percentages are set forth in Chart 12.

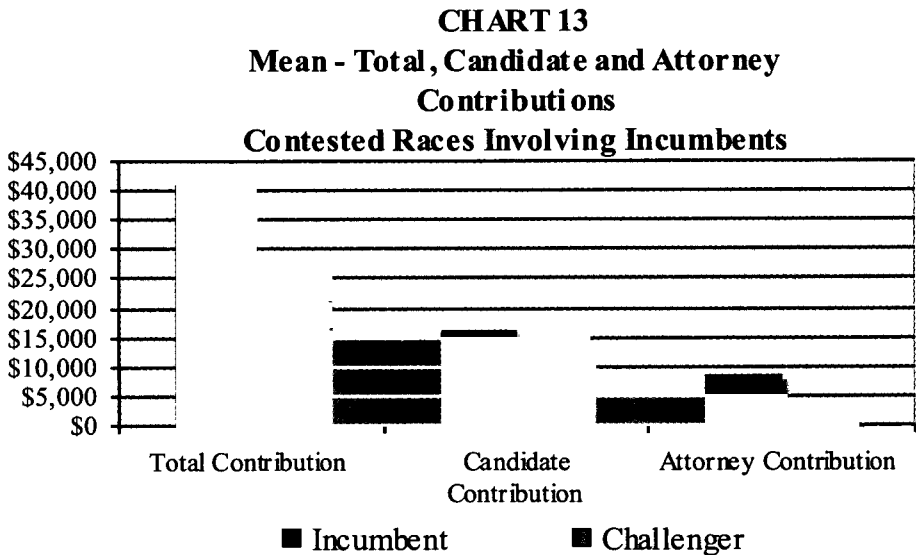
CHART 12
Winning Percentage Relative To Total, Candidate
and Attorney Contribution Differentials



It is apparent from the contribution differential analysis that attorney contribution dollars in contested trial court elections in Arkansas carry an election day intangible. The attorney contribution winning percentage is not only materially higher than the candidate contribution percentage, but it is also higher than the total contribution winning percentage. The nature of the nonmonetary attorney contribution effect cannot be discerned from the financial information contained in the candidate filings. It is clearly an important factor, however, in conducting a winning trial court campaign.

E. Contested Races Involving Incumbents

Approximately one-third of the sixty contests in the study involve incumbents.⁴⁷ Twelve of the incumbent races are prior to Amendment 80 and seven are after Amendment 80. Only two incumbents were defeated during the 1996 through 2006 election cycles,⁴⁸ an 89% success rate. The total contribution and attorney contribution averages are what could reasonably be anticipated with the incumbents enjoying a monetary advantage in both categories.⁴⁹ The unexpected statistic is that incumbents contribute more on the average to their reelection campaigns than do the challengers to their efforts to unseat the incumbents.⁵⁰



The information provided in the candidate filings is of no assistance in determining the validity of the proposition that attorneys can get judges defeated. In sixteen of the nineteen incumbent races, attorneys provided more

47. Incumbents were challenged in nineteen races: twelve prior to the passage of Amendment 80 and seven subsequent to its passage. The nineteen incumbents were: 2004: Simes; 2002: Kinney, Smith, Gibson, Harkey, Reynolds, and Collier; 2000: Simes; 1998: Kinney, Williams, Bogard, Mazzanti, and Langston; and 1996: Butt, Smith, Kilgore, Anthony, Williams, and Huffman.

48. Langston and Williams, both in 1998.

49. Incumbent total contribution average is \$40,749.96, compared to challenger average of \$27,768.85. The incumbent attorney contribution average is \$8,747.22, as opposed to the challenger average of \$1,031.24.

50. The incumbent average candidate contribution is \$16,271.43, and the challenger contribution is \$14,968.84.

support to the winning incumbent than to the challenger. These sixteen races are of no assistance with respect to the "defeating judges" issue. In the three remaining races involving incumbents, attorneys provided greater monetary support to the losing candidate. Of the losing candidates, one was a challenger and two were incumbents. These cases are also of no assistance in testing the "defeating judges" proposition. Actually, with attorneys backing the winner in sixteen out of nineteen races, the information provides evidence that disproves the proposition that attorneys "can't get judges elected."

The seventeen incumbents that won reelection bids received an average of 62.7% of their contest votes. If the two losing incumbent races are factored in, the average is reduced to 60.7%. The seven post-Amendment 80 incumbent races saw the incumbents receive an average of 61.9%, while the ten pre-Amendment 80 winning incumbents received an average of 64.2%. By comparison, the winners in the one-election open seat races posted an average of 57.4% of the contest votes, without any material difference in the vote spread pre-Amendment 80 versus post-Amendment 80. The average percentage vote spread between winning incumbents and the winners of one-election open seats is 5.3%.

V. COMPARISON TO 1989 AND 1992 ARKANSAS JUDICIAL CAMPAIGN STUDIES

There are two prior studies concerning Arkansas judicial candidates useful for comparison purposes with the present study.⁵¹ The Gingerich 1989 study analyzed all judicial candidates' financial reports for the 1976 through 1988 election cycles.⁵² Gingerich described the purpose of the 1989 article as an effort to respond to deficiencies in the availability of empirical data concerning judicial elections and "to define more clearly the state of money in judicial elections in Arkansas."⁵³ Gingerich 1989 took the data accumulated from the Arkansas judicial candidates' reports to test the validity of four conclusions in Arkansas reached by previous judicial campaign studies from other jurisdictions.⁵⁴ The four conclusions tested were: (1) that costs of judicial campaigns are "skyrocketing;" (2) that campaign fundraising is a barrier to office-seeking; (3) that too much money is contributed by lawyers; and (4) that judicial elections can be bought by the candidate with the most money.⁵⁵ Much of the statistical information in Gingerich 1989 concerned areas of inquiry outside the scope of the present study. Because the present study analyzes contested trial court campaigns, the Ginge-

51. Gingerich 1989, *supra* note 1; Gingerich & Readnour 1992, *supra* note 1.

52. Gingerich 1989, *supra* note 1, at 68.

53. *Id.*

54. *Id.*

55. *Id.*

rich 1989 results were sifted to exclude statistical information concerning uncontested trial court races and all information concerning appellate judicial contests and candidates.

Gingerich & Readnour 1992 is substantially more limited in scope than Gingerich 1989. Gingerich & Readnour 1992's stated purpose was to analyze the 1990 judicial elections to determine whether the costs of judicial elections were increasing and whether lawyers were being required to provide a greater percentage of campaign funds for judicial candidates.⁵⁶ As with Gingerich 1989, the 1992 study contains information concerning both trial and appellate court judicial candidates.

A. Gingerich 1989

Gingerich 1989 provides useful comparison data for all of the campaign categories analyzed in the present study. Starting with the threshold inquiry of total campaign contributions, Gingerich 1989 determined that the range of expenditures of all contested judicial races from 1976 through 1988 was \$13,759 in 1978 to \$36,725 in 1980.⁵⁷ It also concluded that the average cost of a contested trial court judicial campaign for the 1976 through 1988 election cycles was \$11,927.⁵⁸ The 1989 study further determined that trial court candidates' contributions accounted for 38% of total contributions⁵⁹ and attorney contributions, in contested trial court races, averaged 9% of contributions.⁶⁰

Gingerich 1989 labels the candidate raising and spending the most money as "the big spender."⁶¹ There is no comparison in the 1989 study about how much money the opponent of the "big spender" candidate raised or any effect on the "big spender" success rate depending upon the size of the monetary spread between the "big money" candidate and his or her opponent. Gingerich 1989 found that the trial court candidate spending the most money won in 64% of the races.⁶²

The 1989 study also contains information concerning incumbents. For the 1976 through 1988 elections, Gingerich 1989 determined that trial court incumbents won 94% of the time.⁶³ In its information concerning incumbents, Gingerich 1989 did not discriminate between contested races and

56. Gingerich & Readnour 1992, *supra* note 1, at 37.

57. Gingerich 1989, *supra* note 1, at 71.

58. *Id.*

59. *Id.* at 70.

60. *Id.*

61. *Id.* at 72.

62. *Id.*

63. Gingerich 1989, *supra* note 1, at 69.

uncontested races, so the 94% incumbent statistic presumably includes both types of races.

The conclusions of Gingerich 1989 refute the applicability of the general national study conclusions for the 1976 through 1988 Arkansas judicial elections. Gingerich 1989 concluded that there was no general trend of increasing campaign costs during the 1976 through 1988 Arkansas judicial election cycles.⁶⁴ It also concluded that there was no discernible trend apparent in percentage of attorney contributions⁶⁵ and that any assertion that lawyers contribute most of the funding for judicial campaigns could not be substantiated.⁶⁶

B. Gingerich & Readnour 1992

Gingerich & Readnour 1992 is a snapshot study of the 1990 judicial election cycle. The 1992 study determined the average total contributions for 1990 trial court candidates, contested as well as uncontested, was \$17,263.⁶⁷ It further found that in all contested races in 1990, in both the appellate and trial courts, candidate contributions comprised approximately 38%⁶⁸ of contributions and attorneys contributed approximately 9.2% of the campaign monies.⁶⁹ In trial court campaigns, the candidate spending the most money won only 65% of the time.⁷⁰ The 1992 study determined that 93% of incumbent trial judges were reelected.⁷¹

Gingerich & Readnour 1992 concluded, as did Gingerich 1989, that Arkansas judicial election statistics for the 1990 election did not support the conclusions that costs of judicial campaigns are "skyrocketing" or that lawyers are being "bankrupted by demands for contributions."⁷²

VI. CONCLUSION

Amendment 80 does not appear to have had any material effect on campaign contributions, at least in one-election contests. Total contributions were trending upward prior to Amendment 80 and continue in that trend. Attorney contributions have not materially changed. The numbers do indicate that total contributions and candidate contributions in runoff races may

64. *Id.* at 71.

65. *Id.* at 70.

66. *Id.* at 72.

67. Gingerich & Readnour 1992, *supra* note 1, at 38.

68. *Id.* at 39.

69. *Id.*

70. *Id.* at 40.

71. *Id.* at 38.

72. *Id.* at 41.

be increasing at a far greater rate than one-election contests. Additional study would be required to determine if that was a function of the general increase in total contributions or whether the additional increase was attributable, at least in part, to the Amendment 80 election configuration.

There is substantially less voter participation in the selection of judicial officers in one-election judicial contests. This change is attributable not to Amendment 80 itself but to the implementing legislation setting the general judicial election on the party primary election date. Finally, none of the data indicates any Amendment 80 related change in retention of incumbents.

So, which one of the following statements, if any, is most probably true and correct in contested Arkansas trial court elections:

- a) The cost of judicial elections is “skyrocketing”;
 - b) Attorneys provide the majority of contributions to judicial campaigns;
 - c) The incumbent enjoys a 5% to 10% edge;
 - d) Attorneys can’t get judges elected but they can get them defeated;
 - e) The candidate raising the most money always wins judicial elections;
- or
- f) Hot glass looks like cold glass.

It is not “A.” With the exception of several multi-election contests, the cost of contested Arkansas trial court races is not “skyrocketing.” Total contributions are clearly increasing, but “skyrocketing” is not an accurate description of the contribution increases.

“B” is clearly not the answer. Attorneys do not provide a majority of campaign contributions. Candidates contribute substantially more money to judicial campaigns than do attorneys. The attorney contribution average never exceeded 17% of the total contribution average for any of the elections included in the present study.

The candidate information available for review is not useful for proving or disproving the latter part of “D,” the proposition that attorneys can get judges defeated. The available data successfully disproves, however, the first part of answer “D” in that attorneys clearly can get judges elected. Even though attorneys provide only 10% to 17% of the average total contributions, the candidate enjoying an attorney contribution differential in excess of \$5000 more than his opponent wins about 90% of the time. This is a higher average than that of the candidate having the highest total contributions with such candidates only prevailing about three out of four times. “D” is therefore not the answer.

That leaves “C” and “F” as the choices for the answer that is “most probably true and correct.” The study information does show that incumbents *who win* have a 5.3% greater margin of victory than the winner in open seat elections. For these incumbents, the “C” proposition is a true statement. Two of the nineteen incumbents, however, did not win. So “C” is only true approximately 89% of the time.

The answer most probably true and correct is "F." Hot glass always looks like cold glass.⁷³ Now before you allege that you have been had, please note that for those of you assuming "relevancy" was included in the question remember your BAR/BRI course and the MBE. Read the question as it is written. Find the most true and correct answer to the question as it is written. Besides, you never know when someone is going to crank up a Bunsen burner at a campaign fish fry.

APPENDIX

LISTING OF CANDIDATES INCLUDED IN STUDY

Year	Last Name	First Name	Ci r.	Div.	Year	Last Name	First Name	Cir.	D iv .
2006	Halsey	Barbara	2	7	2000	Halbert, Jr.	Charles	1	1
2006	Spruell	Ray	2	7	2000	Simes, II	L.T.	1	1
2006	Seagrave	Alan	2	7					
					2000	Hill	Victor	2	6
2006	Wright	Randy	8N	1	2000	Thorne	Fred	2	6
2006	Gunter	Mark	8N	1					
					2000	Proctor	Willard	6	5
2006	Dennis	Jody	11 W	5	2000	Thompson	Morris	6	5
2006	Brown	Waymond	11 W	5					
					2000	Bradley	Len	5	2
2006	Bynum	Frank	11 W	2	2000	Sutterfield	Dennis	5	2
2006	Wyatt	Rob	11 W	2					
					2000	Boyd	Jim	4	1
2006	Hearnsberger	Marcia	18 E	4	2000	Mashburn	Mike	4	1
2006	Bachelor	Latt	18 E	4	2000	Watson	Jeff	4	1
2004	Halbert	Chuck	1	1	2000	Davis	Boyce	4	2
2004	Simes, II	L.T.	1	1	2000	Reynolds	Ray	4	2
					2000	Gunderson	Steve	4	2
2004	Gibbons	Iva Nell	5	2	2000	Lindsay	Mark	4	2
2004	Hodges	Ken	5	2	2000	Woodruff	Ron	4	2
2004	McCain, Jr.	Gordon	5	2					
2004	Murdoch	Timothy	5	2	1998	Bogard	David	6	6
2004	Kennedy	Jim	5	2	1998	Dishongh	Allan	6	6

73. Ms. Catherine Hamilton, 10th grade Chemistry teacher, Hall High School, Little Rock, Arkansas (1973) (stated repeatedly and to no avail based upon the repeated trips to the school nurse with no apparent comprehension by the intended recipients).

2004	French	Teresa	10	5	1998	Langston	Don	12	1
2004	Mazzanti	Joe	10	5	1998	Fitzhugh	Michael	12	1
2002	Kinney	Baird	1	5	1998	Marschewski	Jim	12	2
2002	Murray	Todd	1	5	1998	Stubblefield	Michael	12	2
2002	Fulkerson	Andy	2	1	1998	Pierce	Mackie	6	1 3
2002	Honeycutt	Pamela	2	1	1998	Hirby	Oscar	6	1 3
2002	Moore	H.T.	2	1					
					1998	Mazzanti	Jerry	10	2
2002	Fergus	Lee	2	2	1998	Daniels	Bill	10	2
2002	Hunter	Ron	2	2					
2002	Seagrave, III	Alan	2	2	1998	Kinney	Baird	1	
					1998	Myers, III	Ralph	1	
2002	Boling	Larry	2	10					
2002	Huckaby	Curt	2	10	1998	Williams	Charles	4	3
					1998	Zimmerman	Stacey	4	3
2002	Kissee	Larry	3	2					
2002	Smith	Phil	3	2	1998	Gunn	Mary Ann	4	4
					1998	Burnett	Jim	4	4
2002	Fox	Tim	6	6					
2002	Johnson	J. Leon	6	6	1998	Partridge	Sandra	7N	3
					1998	Phillips	Gri-sham	7N	3
2002	Cazort	Brad	6	7					
2002	Reif	Ellen	6	7	1998	Epley	Alan	19E	
2002	Sims	Barry	6	7	1998	Crow	Kent	19E	
2002	Maulding	Diana	6	14	1998	Cottrell	Gary	21	2
2002	Smith	Vann	6	14	1998	Baker	Charles	21	2
2002	Hirby	H. Oscar	6	15	1996	Simes, II	L.T.	1	1
2002	Moore	Richard	6	15	1996	Whitfield, Jr.	Sam	1	1
2002	Hart	Demaris	8S	3	1996	Watson	Jeff	4	1
2002	Johnson	Kirk	8S	3	1996	Butt	Thomas	4	1
					1996	Burnett	Jim	4	1
2002	French	Teresa	10	3					
2002	Gibson	Bynum	10	3	1996	Kilgore	Collins	6	
					1996	Hirby	Oscar	6	
2002	Henry	David	11 E	1					
2002	Jenkins	Claude	11 E	1	1996	Smith	Vann	6	1 4
					1996	Maulding	Diana	6	1 4

2002	Benton	Bill	11 W	3					
2002	Bynum	Wilson	11 W	3	1996	Post	Paul	12	1
2002	Hall	Jim	11 W	3	1996	Smith, Jr.	Willard	12	1
2002	Scussel	Jan	11 W	3	1996	Saxon	David	12	1
2002	Williams II	James	11 W	3	1996	Wilkinson	Norman	12	1
					1996	O'Hern	Jim	12	1
2002	Carter	Christopher	14	3					
2002	Putman	John	14	3	1996	Anthony	Carol	13	4
					1996	Hall	Pat	13	4
2002	Kelly	Michael	14	4					
2002	Webb	Gordon	14	4	1996	Scribner	Linda	19W	2
					1996	Huffman	Donald	19W	2
2002	McCormick	David	15	2					
2002	Mueller	Brian	15	2	1996	Yeagan	Charles	9W	
					1996	Alford	Ed	9W	
2002	Harkey	Norman	16	2					
2002	Rutledge	Keith	16	2	1996	Whiteaker	Phillip	17W	2
					1996	O'Bryan	Joe	17W	2
2002	Tilley	Bryan	16	4					
2002	Weaver	Tim	16	4	1996	Collier	Linda	20	2
					1996	Murphy	Michael	20	2
2002	Fuller	Carla	17	3					
2002	Hannah	Craig	17	3	1996	Jones	Casey	20	4
2002	Hughes	Tom	17	3	1996	Williams	Tim	20	4
					1996	Baker	Karen	20	4
2002	Green	Robin	19 W	4					
2002	Scott	John	19 W	4					
2002	Harper	Steve	20	1					
2002	Reynolds	David	20	1					
2002	Maggio	Mike	20	2					
2002	Shaw	Frank	20	2					
2002	Collier	Linda	20	4					
2002	Grinder	Helen	20	4					
2002	Bagby	Philip	21	2					
2002	Medlock	Mike	21	2					